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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 788

RICHARD EICHENLAUB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 24-29) are reported at 180 F. 2d 314.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1950 (R. 30). The petition for a writ of certiorari was filed on April 29, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in addition to petitioner's consent to the entry of a judgment of denaturalization, under Section 338 of the Nationality Act of 1940, it was necessary to adduce proof of the allegations of the complaint to support a valid judgment.

2. Whether the court below properly refused to reopen a consent denaturalization judgment which was entered on a complaint which petitioner now attacks as having been insufficient in law.

STATUTE AND RULES INVOLVED

The pertinent statute and rules involved appear in the Appendix, *infra,* pp. 12-14.

STATEMENT

Petitioner was born in Germany in 1905, and came to the United States in 1930 (Pet. 2). On November 17, 1936, he was admitted to citizenship (R. 9-10). On July 15, 1941, he and others were indicted in the United States District Court for the Eastern District of New York for conspiring to act as unregistered agents of a foreign government. It was alleged that the conspiracy began on April 1, 1936, and continued until the date of the indictment. Petitioner pleaded guilty in September 1941 and, in January 1942, he was sentenced to 18 months' imprisonment and fined $1,000 (Pet. 2-3; see also *Eichenlaub* v. *Shaughnessy,* 338 U.S. 521, 523.)

On August 11, 1943, about four months after petitioner's discharge from imprisonment (Pet.

4), the United States filed a complaint to revoke his naturalization (R. 8-12). The complaint alleged that in or about 1937, "shortly after his naturalization," he acted as agent in the United States for the German Customs and Investigation Division of Hamburg and Bremen; that from and after the date of his naturalization he collaborated and consorted with agents of Germany to aid and advance the interests of Germany within the United States; that on September 4, 1941, he pleaded guilty to the conspiracy count of the aforementioned indictment; that from 1933 to 1936 he lived in adulterous relations; and that one of the subscribing witnesses to his petition for naturalization, knowing that petitioner had lived in adultery, nevertheless swore falsely that he was a person of good moral character during the five years preceding his petition for naturalization (R. 10). The complaint further alleged that "By reason of the foregoing", petitioner's naturalization "was fraudulently and illegally procured by him, in that, among other things," he was not, at the date of his naturalization, attached to the principles of the Constitution nor well disposed to the good order and happiness of the United States, did not intend to renounce all allegiance to Germany, maintained a mental reservation that nullified his oath of allegiance, did not intend to support and defend the Constitution and laws of the United States against all enemies, and did not intend to bear true faith

and allegiance to the United States and its Constitution. It was alleged, finally, that petitioner had not been of good moral character for the statutory period preceding his naturalization and that one of the witnesses to his petition for naturalization had sworn falsely as to his good moral character during that period. (R. 11.)

Petitioner first filed, by counsel, an answer denying the allegations of the complaint (R. 13), but later, on January 24, 1944, he entered a sworn consent to judgment. In this document, he stated that he had "no defense to the aforesaid action" and consented to the entry, without notice to him, of a decree revoking the order admitting him to citizenship, cancelling his certificate of naturalization, and "forever restraining [him] from setting up or claiming any rights, privileges, benefits, or advantages under the said order or said certificate." The consent was "Agreed and consented to" by petitioner's counsel. (R. 17-19.) Accordingly, a judgment of denaturalization was entered on January 25, 1944 (R. 14-15).

In April 1944, petitioner was arrested in deportation proceedings and, in 1945, the Attorney General ordered his deportation (Pet. 3). Petitioner then obtained a writ of habeas corpus which was dismissed after hearing. The dismissal was affirmed both by the Court of Appeals for the Second Circuit, 167 F. 2d 659, and this Court, 338 U.S. 521.

Meanwhile, in January 1946, petitioner moved for an order vacating the judgment of denaturalization (R. 2-4). The only reasons tendered in support of his motion were that, as held in a number of cases cited in a supporting affidavit, the fraud or illegality charged as the basis for denaturalization "must be proved by the clearest and most satisfactory evidence," that in his case "no proof was ever submitted that deponent had committed fraud in procuring his certificate of naturalization," and that he had "a full and complete defense to the cause of action alleged in the complaint" for denaturalization. The motion was denied on February 28, 1946 (R. 20), the District Court holding that "A consent decree is not a default decree. There is no better evidence than a party's consent in writing to entry of a decree" (R. 19).

Petitioner filed his notice of appeal on March 25, 1946 (R. 21), but the record was not certified to the Court of Appeals until December 30, 1949 (R. 23), after the argument of the habeas corpus case in this Court, but before the decision in that case. On the appeal, petitioner urged reversal of the order of the District Court on two additional grounds not raised in his motion in that court. The first of these was that the Government's complaint was insufficient since even if its allegations had been proved, they would not have supported the judgment of denaturalization. The other was the bare assertion, unsupported by any evidence, that

petitioner, a man of "meager" education and "limited" understanding of the English language, was misinformed as to the effect of his consent to the judgment of denaturalization. (R. 25-27, 29.) The Court of Appeals affirmed the order of the District Court, holding that the complaint was adequate to support the judgment, that a defendant's consent to the entry of a judgment of denaturalization, given with the knowledge and consent of his attorney, is the equivalent of proof required to support the judgment, and that no real infirmity in the consent of petitioner had been asserted or proved (R. 25-28). Judge Frank, dissenting, thought that in the light of *Baumgartner* v. *United States,* 322 U.S. 665, the complaint was insufficient and he was therefore inclined "to think we should reverse." He made no comment upon petitioner's argument that a consent, without proof, could not support a judgment of denaturalization. Pointing out that the question whether petitioner had in fact validly consented to the entry of judgment had not been raised below, Judge Frank stated that petitioner, in his view, was not barred from making a new motion in the District Court where proof of his alleged lack of understanding might well require the setting aside of the judgment. (R. 28-29.)

ARGUMENT

1. The sole question before the District Court was whether the judgment of denaturalization was invalid because petitioner's consent thereto was

not supported by actual proof of the allegations of the complaint. The decisions of both courts below rejecting petitioner's view on this point are sound. For consent, as the Court of Appeals pointed out, is the equivalent of proof (R. 26, 27). The force of this conclusion is not weakened by the fact that denaturalization carries grave consequences and must be supported by clear and convincing evidence. That is no less true of convictions of serious crimes punishable by the most onerous penalties. Yet it is no longer open to argument that such convictions may validly rest upon pleas of guilty or *nolo contendere.* This is so because these pleas are a substitute for, and tantamount to, the degree of proof required. *Thomson* v. *Wooster,* 114 U. S. 104, 110-111. So it is with a consent in a denaturalization proceeding.

It is one thing to require a high degree of proof where the defendant, by contesting the suit, has placed the material facts in issue. It is quite another where there are no contested issues. Thus a judgment of denaturalization may be entered without proof upon the defendant's default. *Klapprott* v. *United States,* 335 U. S. 601, concurring opinion of Burton, J., and dissenting opinions of Reed and Frankfurter, JJ., judgment modified, 336 U. S. 942; *United States* v. *Borchers,* 163 F. 2d 347, 349-350 (C.A. 2), certiorari denied, 332 U. S. 811; *United States ex rel. Stabler* v. *Watkins,* 168 F. 2d 883, 885 (C.A.

2). In the case at bar, petitioner went beyond a mere failure to contest by default. He expressly agreed that there was nothing at issue, saying, "I have no defense to the aforesaid action", and consenting to the entry of the judgment (R. 18). The judgment thereupon entered was valid and invulnerable to the attack made upon it in the District Court. *United States* v. *Borchers, supra.*

2. In the first of the new points raised on appeal, petitioner argues that the denaturalization complaint was insufficient (Pet. 9-16) and therefore, had all its allegations been proved, they could not have supported the judgment. This contention of law is, we think, adequately answered by the opinion below (R. 27-28). This Court has never suggested that acting as a German agent "shortly after [petitioner's] naturalization", or collaborating with foreign agents "*From* and after the date of his naturalization" is insufficient, as a matter of law, to establish a lack of allegiance at the time an applicant for citizenship takes his naturalization oath. In any event, it is one thing to invoke the liberal Rule 60(b) of the Federal Rules of Civil Procedure as ground for opening a denaturalization judgment when it was obtained by default and there are circumstances suggesting that the default was unavoidable or excusable, or even possibly contrived by the prosecution (*Klapprott* v. *United States,* 335 U. S. 601) ; it is quite another

matter when a collateral attack is made on a judgment consented to, on advice of counsel, simply because of the alleged legal insufficiency of the complaint. If such belated legal doubts were, in and of themselves, ground for reopening, there would be no end to relitigation under the Federal Rules.

It is to be noted, additionally, that the complaint further alleged that petitioner, while married, lived in adulterous relations during the five-year period preceding the filing of his petition for naturalization (R. 10), thus failing to meet the requirement of good moral character during that period (R. 11), and that one of his witnesses, knowing of his adulterous relations, nevertheless falsely swore that he was a person of good moral character (R. 10, 11). These allegations were also sufficient in themselves to support the judgment. See *Estrin* v. *United States,* 80 F. 2d 105 (C.A. 2); *United States* v. *Marafioti,* 43 F. Supp. 45 (S.D.N.Y.) [1]

3. The second new claim (Pet. 22-25), that petitioner gave his consent to the judgment of denaturalization without being informed of, or understanding, its effect, is untimely and finds no support whatever in the record. Had this question

[1] Later cases have permitted the finding of mitigating circumstances to bar the conclusion that unconventional sexual conduct necessarily denotes immoral character. *Schmidt* v. *United States,* 177 F. 2d 450 (C.A. 2); *Petition of Rudder,* 159 F. 2d 695 (C.A. 2); *United States* v. *Rubia,* 110 F. 2d 92 (C.A. 5). But this is a matter of proof, not of pleading.

been raised in the district court, it could have been litigated and resolved. As it is, there is nothing before this Court but petitioner's unsupported statement, made for the first time in his brief in the court below. There is, therefore, no basis upon which to grant petitioner relief here or even to remand the case for that purpose to the district court, and even Judge Frank, dissenting below, did not state otherwise.

Beyond this, however, the tenuousness of petitioner's claim is apparent on its face. Both he and his lawyer, who was present, signed the consent (R. 18-19; Pet. 18). He claims he did so because his lawyer advised him that he could not get a fair trial "due to the stresses of the times and the emotions of the hour" (Pet. 18). But this does not detract from the deliberate and voluntary nature of the act or negate his own statement that he had "no defense to the aforesaid action" (R. 18).

The only other allegation made by petitioner in support of his claim that he should not be bound by his consent is that the Assistant United States Attorney before whom he signed it represented to him that it would result merely in a suspension of his citizenship for the duration of the war (Pet. 17-19). He says in this connection that his own attorney assured him that he could rely on this statement. There is, of course, no provision in the law for a temporary suspension of citizenship. It is difficult to believe that a responsible

government official would resort to a patent fraud to deceive petitioner into consenting to the judgment. It is likewise difficult to believe that petitioner's lawyer was so ignorant or even dishonest, without any disclosed or suggested motive for dishonesty, as to join in such misrepresentation. Moreover, petitioner's present allegation is negated by the very terms of his consent to a judgment, *inter alia,* "forever restraining me from setting up or claiming any rights, privileges, benefits, or advantages under the said order or said certificate" of naturalization (R. 18). It is incredible that, had there been any truth in the allegation, it would not have been submitted as a ground for the motion made in the district court instead of being injected, as an afterthought, in petitioner's brief on appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1950.

APPENDIX

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U.S.C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its amendment effective March 19, 1948, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal repre-

sentative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Rule 60(b), as amended, provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief

from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U.S.C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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